

Fair Political Practices Commission
MEMORANDUM

TO: Chairman Getman, Commissioners Downey, Knox, Scott and Swanson

FROM: C. Scott Tocher, Counsel, Legal Division
Luisa Menchaca, General Counsel

DATE: December 24, 2001

SUBJECT: Implementation of Proposition 34; Adoption of Regulation 18450.11, Paid Spokesperson Disclosure and Form 511, Paid Spokesperson Report

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On November 7, 2000, the voters approved Proposition 34, which significantly amended the Political Reform Act ("Act"). Among other things, Proposition 34 added section 84511, which addresses paid spokesperson disclosures in ballot measure advertising. The statute was amended by Senate Bill 34, enacted in September of 2001. At its November meeting, the Commission considered several issues raised by the statute and a draft regulation. The ensuing draft regulation, attached as Exhibit A, incorporates the Commission's decisions in November and raises several additional issues, discussed fully below. In light of the impending March primary elections, **Staff recommends the Commission adopt regulation 18450.11 permanently and approve proposed Form 511, which implements section 84511.**

I. BACKGROUND

Government Code¹ section 84511 was added to the Act by Proposition 34. In a nutshell, the statute requires disclosure, both in an advertisement and in a filed report, whenever a committee has paid \$5,000 or more to an individual to appear in an advertisement regarding a ballot measure. Because comparison between the statutes as enacted versus its amended version is relevant to the ensuing discussion, each is set forth below. As enacted by the voters in November 2000, section 84511 read:

"Any individual who appears in an advertisement to support or oppose the qualification, passage, or defeat of a ballot measure and who has been paid or promised payment of five thousand dollars (\$5,000) or more for that appearance shall disclose that payment or promised payment in a manner prescribed by the commission. The advertisement shall include the statement '(spokesperson's name) is being paid by this campaign or its donors' in highly visible roman

¹ All statutory references are to the Government Code.

font shown continuously if the advertisement consists of printed or televised material, or spoken in a clearly audible format if the advertisement is a radio broadcast or telephone message."

Senate Bill 34 amended the statute, which now reads as follows:

"84511.

"(a) A committee that makes an expenditure of five thousand dollars (\$5,000) or more to an individual for his or her appearance in an advertisement to support or oppose the qualification, passage or defeat of a ballot measure shall file a report within 10 days of the expenditure. The report shall identify the measure, the date of the expenditure, the name of the recipient, and the amount expended.

"(b) The advertisement shall include the statement '(spokesperson's name) is being paid by this campaign or its donors' in highly visible roman font shown continuously if the advertisement consists of printed or televised material, or spoken in a clearly audible format if the advertisement is a radio broadcast or telephone message."

The amended statute introduces several important changes. First, instead of requiring the filing of the report by the *spokesperson*, the law now requires the report to be filed by the *committee* that pays the spokesperson. Second, the "trigger" for the disclosure used to occur upon the "payment" or "promised" payment of the requisite sum. Now, the disclosure is triggered by "an expenditure." Finally, the new law elaborates on the type of disclosure to be made in the filed report. Specifically, the old law made reference only to the disclosure of "that payment or promised payment" as the Commission requires. The new law requires greater disclosure. Currently, a committee must identify: 1) the measure, 2) the date of the expenditure, 3) the name of the recipient, and 4) the *amount* expended.

II. PROPOSED REGULATION 18450.11²

A. Subdivision (a):

Subdivision (a) of the proposed regulation addresses two critical decisions the Commission made at the November meeting. First, the Commission decided that expenditures that *aggregate* to \$5,000 or more are sufficient to trigger the reporting obligation. Thus, the reporting requirements may not be avoided merely by spreading out payments in increments less than \$5,000. Second, subdivision (a) reflects the Commission's determination that if the spokesperson will be paid \$5,000 or more for the appearance, regardless of when the payment is made, it will be reportable. The subdivision is broken into two sentences. The first sentence declares that multiple

² The language of the proposed regulation differs somewhat from the version noticed in the Office of Administrative Law notice. The primary difference is the addition of the second sentence in subdivision (a) of the proposed regulation. A copy of the OAL version is attached as Exhibit B.

payments will be aggregated to reach the \$5,000 threshold. The second sentence identifies *when* the expenditures will be considered "made" for purposes of filing the report.

With regard to the first sentence (concerning the \$5,000 threshold), as may be rightly observed, section 84511 was amended by Senate Bill 34 to strike the words "or promised payment" from the statute. It may be argued, thereby, that a "promised payment" no longer is contemplated in the statute to trigger reporting. Thus, if the payments to a spokesperson, made before the advertising appears, fail to meet the \$5,000 threshold, then no disclosure (either on the advertisement or in the report) will be required. Such an argument fails, however, because the statute now refers to "expenditures" instead of mere "payments." The term "expenditure" is defined in the Act to include promised payments:

"82025. Expenditure.

"'Expenditure' means a payment, a forgiveness of a loan, a payment of a loan by a third party, or *an enforceable promise to make a payment, ...*" (§ 82025.)

Thus, because by definition an "expenditure" includes a "promised payment," it would be redundant to insert that language in the first sentence of subdivision (a) of the proposed regulation.

Decision 1. The Commission's must decide in the second sentence the precise triggering event for the filing of a report. Put more specifically, now that we know from the first sentence that we will be counting multiple payments (including promised payments) towards the \$5,000 threshold, *when shall we require the report to be filed?* Answer: When the payment is made? When the spokesperson's services are rendered? When consideration, such as formation of a contract or promised payment, is received?

Section 82025, defining "expenditure," states:

"An expenditure is made on the date the payment is made or on the date consideration, if any, is received, whichever is earlier."
(§ 82025.)

It seems indisputable that an expenditure is "made" when a payment is made. The language of section 82025, however, goes a step further by stating that an expenditure is made on the date "consideration" is received. In contract law, consideration can include the exchange of mutual promises to perform certain acts. (*Blecher v. Conte* (1981) 29 Cal.3d 345, 350.) As a result, the formation of a contract to perform spokesperson services would trigger the requirement to file a report, as opposed to when the commercial is filmed (receipt of the spokesperson's services) or when the spokesperson is paid. The language in **Option 1b** reflects this interpretation.

On the other hand, if the Commission interprets "when consideration is received" more narrowly, such as when the spokesperson's services are rendered, then the filing, in the hypothetical above, might be triggered at a later date. It is current staff advice that an expenditure is made "on the date the payment is made or the date that the candidate or committee receives the goods or services, whichever is earlier." (See, e.g., Controlled Cmte Manual, p. 40; Recipient Cmte Manual, p. 29; Exhibit C.) Thus, in the hypothetical posed above, the mere signing of a contract to perform spokesperson services would not trigger the filing of the report. Rather, the report would be filed when the spokesperson was paid or when the spokesperson rendered his or her services. The language in **Option 1a** reflects this interpretation.

Staff makes no recommendation as between these options. If the language of Option 1b is chosen, staff believes the limiting language of the regulation would limit this interpretation of the regulation to the spokesperson disclosure report, meaning current advice in other areas would not be modified.

B. Subdivision (b):

Subdivision (b) of the proposed regulation itemizes the information to be disclosed on the report filed by the committee. Drawing the Commission's attention to subdivision (b)(5), the regulation calls for disclosure of "the total amount of the expenditure." Prior to section 84511's amendment, there was discussion whether the statute required disclosure of the *actual* amount paid to the spokesperson or whether only the *fact* that \$5,000 or more had been paid had to be disclosed. As amended, the statute is clarified to require disclosure of "the amount expended," and thus the language in subdivision (b)(5) of the proposed regulation requires the total amount of the expenditure to be reported.

C. Subdivision (c):

Subdivision (c) of the proposed regulation affirms the electronic filing obligations imposed by section 84605.

Staff recommends adoption of regulation 18450.11, with either option 1a or 1b.

III. FORM 511

Attached as Exhibit D is proposed Form 511, the Paid Spokesperson Report that committees will use to comply with section 84511, subdivision (a). The form incorporates the requirements of the draft regulation.

The form was sent to interested persons in October and was discussed at an Interested Persons meeting held on October 18, 2001.

Staff recommends approval of Form 511.